MISSOURI APPROVED JURY INSTRUCTIONS [MAI]

May 2021 Pocket Part

Prepared by the
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ON
CIVIL JURY INSTRUCTIONS

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PREFACE

This pocket part to *Missouri Approved Jury Instructions (MAI)* updates the Eighth Edition with new and revised jury instructions and cases received through March 2, 2021.

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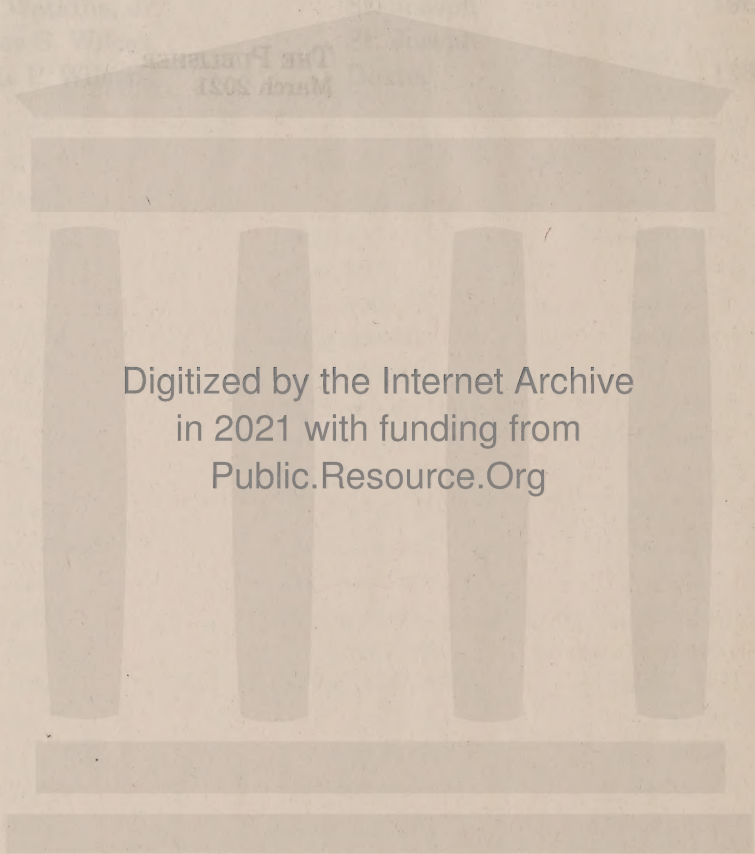
March 2021



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24.01(A) [2021 Revision] Verdict Directing—Constructive Knowledge Not In Issue—Failure to Provide Safe Place to Work

(Approved March 2, 2021; Effective July 1, 2021)

Your verdict must be for plaintiff[1] if you believe:

First, plaintiff was an employee of defendant,[2] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[3] and

Third,[4] defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe [appliances],[5] or

reasonably safe methods of work, or

reasonably adequate help, and[6]

Fourth, defendant in any one or more of the respects submitted in Paragraph Third was negligent,[7,8] and

Fifth, such negligence[7] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[9]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number *(here insert number of affirmative defense instruction)*].

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. In a case where defendant is submitting plaintiff's contributory negligence, the initial phrase of plaintiff's verdict director should be modified as follows:

> In your verdict, you must assess a percentage of fault to defendant [whether or not plaintiff was partly at fault],[1] if you believe:

[1] The bracketed phrase may be used at plaintiff's option.

2. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

3. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

4. The specifications of negligence set forth in this instruction concern conditions of which the defendant had constructive knowledge. See MAI 24.01(B) for cases in which constructive knowledge is disputed.

5. The term "equipment" or any other statutory term used in 45 U.S.C.A. § 51 may be substituted for the word "appliances."

6. In the event that the negligence charged is based upon the acts of the defendant's employee, the following alternate paragraphs Third and Fourth must be used.

"Third, defendant's employee *(characterize the negligent conduct, i.e., failed to keep a careful lookout, etc.)*, and"

"Fourth, defendant's employee was thereby negligent, and"

7. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

8. In the event that there is only a single submission of negligence under paragraph Third, then paragraph Fourth must be modified to read as follows:

"Fourth, defendant was thereby negligent, and"

9. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence or failure to mitigate damages in an FELA case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 446.)

24.01(B) [2021 Revision] Verdict Directing—Constructive Knowledge Disputed—Failure to Provide Safe Place to Work

(Approved March 2, 2021; Effective July 1, 2021)

Your verdict must be for plaintiff[1] if you believe:

First, plaintiff was an employee of defendant,[2] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[3] and

Third,[4] conditions for work were not reasonably safe and defendant knew or by using ordinary care[5] could have known of such conditions and that they were not reasonably safe, and

Fourth, with respect to such conditions for work, defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe [appliances],[6] or

reasonably safe methods of work, or

reasonably adequate help, and

Fifth, defendant in any one or more of the respects submitted in Paragraph Fourth was negligent,[5] and[7]

Sixth, such negligence[5] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[8]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ (here insert number of affirmative defense instruction)].

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. In a case where defendant is submitting plaintiff's contributory

negligence, the initial phrase of plaintiff's verdict director should be modified as follows:

> In your verdict, you must assess a percentage of fault to defendant [whether or not plaintiff was partly at fault],[1] if you believe:
>
> [1] The bracketed phrase may be used at plaintiff's option.

2. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

3. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

4. MAI 24.01(B) is to be used in cases in which constructive knowledge of the railroad is disputed. *Qualls v. St. Louis SW Ry. Co.*, 799 S.W.2d 84 (Mo. banc 1990), *cert. denied* 499 U.S. 961, 111 S.Ct. 1585, 113 L.Ed.2d 650 (1991). This instruction should not be used "if the judge decides the plaintiff has shown defendant had actual knowledge of the negligently produced condition." *Qualls*, 799 S.W.2d at 87.

5. The terms "negligent" and "negligence" must be defined. The term "ordinary care" must be defined. See definitions in Chapter 11.00.

6. The term "equipment" or any other statutory term used in 45 U.S.C.A. § 51 may be substituted for the word "appliances."

7. In the event that there is only a single submission of negligence under paragraph Fourth, then paragraph Fifth must be modified to read as follows:

"Fifth, defendant was thereby negligent, and"

8. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence or failure to mitigate damages in an FELA case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 449.)

24.04(B) [2021 Revision] Affirmative Defense—Contributory Negligence

(Approved March 2, 2021; Effective July 1, 2021)

In your verdict, you must assess a percentage of fault to plaintiff [whether or not defendant was partly at fault][1] if you believe:

First, plaintiff *(characterize the act of negligence, such as "failed to keep a lookout for oncoming trains")*, and

Second, plaintiff was thereby negligent,[2] and[3]

Third, such negligence[2] of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

1. The bracketed phrase may be used at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

3. If more than one specification of negligence is submitted, modify Paragraph First to submit such specifications in the disjunctive and modify Paragraph Second to read:

"Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and"

4. Select the appropriate phrase.

If contributory negligence is submitted, see MAI 24.06 and 24.07 for appropriate modification of the damage instruction in an FELA case. Use Verdict Form 37.07.

Committee Comment (2016 Revision)

(Unchanged—See text of Committee Comment, Main Volume, p. 457.)

24.06 [2021 Revision] Damages—Death of Employee

(Approved March 2, 2021; Effective July 1, 2021)

If you find in favor of the plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate *(here identify the beneficiaries)* for any damages you believe (he, she, they) [and decedent][1] sustained [and *(here identify the beneficiaries)* are reasonably certain to sustain in the future][2] as a direct result of the fatal injury to *(name of decedent)*. Any award of future pecuniary damages must be included at present value. [Any award you may make is not subject to income tax.][3] [In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to decedent. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you attribute to decedent.][4]

You must not consider grief or bereavement suffered by reason of the death.

Notes On Use (1996 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 460.)

Committee Comment (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

A. This instruction is used only in FELA cases wherein the employee was fatally injured. The reference to present value is used in FELA cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). *Dickerson* clearly requires inclusion of the sentence relating to present value if requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in an FELA case is now consistent with the method in Chapter 37.00 for use in cases based on Missouri law. FELA cases are governed by federal law. Under Chapter 37.00, the *jury* determines total damages and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing *total damages* to the amount recoverable by plaintiff. This is consistent with the submission of comparative fault in FELA cases in other jurisdictions.

C. 45 U.S.C.A. Section 53 states that "the jury" is to determine the damages "in proportion to the amount of negligence attributable to such employee. . . ." The statutory provision does not specify how the jury is to make that determination. The United States Supreme Court has held that the jury can make its determination by writing down percentages of fault for both parties and separately recording the amount of total damages. *Norfolk & Western Ry. Co., v. Ayers*, 538 U.S. 135 (2003) at 144 n.6; 570–71 (where the Court sanctioned the use of verdict forms which required the jury to write down percentages of fault and the amount of total damages in an FELA asbestosis claim).

D. During the instruction conference, the parties and the court should discuss, on the record, what damages are supported by the evidence and can properly be argued to the jury. In FELA wrongful death cases, recovery is limited to pecuniary losses. See *American Railroad Co. of Porto Rico v. Didricksen*, 227 U.S. 145 (1913); *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In this way, jury arguments can proceed without undue interruptions.

24.07 [2021 Revision] Damages—Injury to Employee

(Approved March 2, 2021; Effective July 1, 2021)

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] as a result of the occurrence[2] mentioned in the evidence. [In determining plaintiff's damages, you may include an amount to compensate plaintiff for the fear of cancer if you believe that such fear is genuine and serious.][3] Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.][4] [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number____, in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure.][5] [In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.][6]

Notes on Use (2010 Revision)

(Unchanged—See text of Notes on Use, Main Volume, p. 462.)

Committee Comment (2021 Revision)

(Approved March 2, 2021; Effective July 1, 2021)

A. The reference to present value is used in FELA cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). *Dickerson* clearly requires inclusion of the sentence relating to present value if requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in an FELA case is now consistent with the method in Chapter 37.00 for use in cases based on Missouri law. FELA cases are governed by federal law. Under Chapter 37.00, the *jury* determines total damages and plaintiff's percentage of

fault but the *judge* makes the actual computation diminishing *total damages* to the amount recoverable by plaintiff. This is consistent with the submission of comparative fault in FELA cases in other jurisdictions.

C. 45 U.S.C.A. Section 53 states that "the jury" is to determine the damages "in proportion to the amount of negligence attributable to such employee. . . ." The statutory provision does not specify how the jury is to make that determination. The United States Supreme Court has held that the jury can make its determination by writing down percentages of fault for both parties and separately recording the amount of total damages. *Norfolk & Western Ry. Co., v. Ayers*, 538 U.S. 135 (2003) at 144 n.6; 570–71 (where the Court sanctioned the use of verdict forms which required the jury to write down percentages of fault and the amount of total damages in an FELA asbestosis claim).

D. This instruction is used only in FELA cases where the employee sustained injury. Other than the references to taxation, present value, and mitigation of damages, it is essentially the same as MAI 4.01 with the exception that the word "direct" is deleted from the fifth line of MAI 4.01. This is required in an FELA case so that the instruction complies with the substantive law set forth in *Wilmoth v. Chicago, Rock Island & P.R. Co.*, 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 89 S.Ct. 1706, 23 L.Ed.2d 176 (1969); and *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

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Missouri Approved Jury Instructions [MAI], Eighth Edition

May 2021 Pocket Part

by the Missouri Supreme Court Committee on Civil Jury Instructions

Enclosed is May 2021 Pocket Part for Missouri Approved Jury Instructions [MAI], Eighth Edition. These materials include revised Instructions, Notes on Use, and Committee Comments approved by the Missouri Supreme Court in March of 2021. For ease of handling, please note the materials in this shipment may ship in more than one box.

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Highlights

New features and recent developments in this May 2021 Pocket Part include:

Instructions, Notes on Use, and Committee Comments updated pursuant to the March 2, 2021 order of the Missouri Supreme Court, including:

- 24.01(A) Verdict Directing—Constructive Knowledge Not In Issue—Failure to Provide Safe Place to Work

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- 24.01(B) Verdict Directing—Constructive Knowledge Disputed—Failure to Provide Safe Place to Work
- 24.04(B) Affirmative Defense—Contributory Negligence
- 24.06 Damages—Death of Employee
- 24.07 Damages—Injury to Employee

Filing Instructions

PLACE the new May 2021 Pocket Part into the back of Missouri Approved Jury Instructions [MAI], Eighth Edition.

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